National Union of Hotel, Bar and Restaurant Workers, Peninsular Malaysia v Muhammad Zailani bin Mat Zin & Anor

HIGH COURT (KUALA LUMPUR) — APPLICATION FOR JUDICIAL REVIEW NO WA-25–257–09 OF 2020
NOORIN BADARUDDIN J
6 JUNE 2022

Civil Procedure — Judicial review — Application for — Applicant applied for judicial review against decision of second respondent — Second respondent allowed first respondent's claim for unfair dismissal — Whether second respondent in concluding that first respondent was not member of applicant but 'workman' was legal, rational and reasonable — Whether second respondent clothed with jurisdiction to determine matter involving expulsion of trade union memberships — Whether award in allowing first respondent's claim warranted court's intervention to quash award

This was a judicial review application where the applicant sought for an order of certiorari to quash an award by the second respondent ('the Industrial Court') in allowing the first respondent's claim for unfair dismissal from his employment by the applicant and awarded a sum of RM140,010 in the form of backwages and compensation ('the award'). The applicant was a trade union registered under the Trade Union Act 1959 ('the TUA') while the first respondent was a former employee of Holiday Inn On The Park, Kuala Lumpur ('the hotel'). Whilst being an employee of the hotel, the first respondent was elected as the branch committee member and subsequently became the branch treasurer of the applicant's Selangor branch. Although the first respondent was retrenched by the hotel in 1999, he continued being a member of and remained the full-time branch officer of the applicant. In the course of the employment, the first respondent drew a salary, bonus and the applicant contributed to the first respondent's Employee Provident Fund. Around May 2018, it came to the applicant's knowledge that the first respondent had committed acts of serious misconduct and in view of its seriousness, the applicant carried out an investigation. The first respondent was issued with a show cause letter and he replied. However, his explanation was rejected. The applicant further alleged that the first respondent had also misappropriated the applicant's funds and caused the approval of unreasonable and unsubstantiated claims by the Selangor branch chairman and secretary. The applicant then decided to expel the first respondent from its membership with immediate effect. Before the Industrial Court, the first respondent claimed that he was a workman as defined under the Industrial Relations Act

1967 ('the IRA') and that his dismissal from his employment with the applicant was without just cause or excuse and prayed for his reinstatement to his former position. The Industrial Court, by the award, decided the matter in the first respondent's favour. Hence, this application. The issues for consideration were: (a) whether the Industrial Court in concluding that the first respondent was not a member of the applicant but a 'workman' within the definition of s 2 of the IRA was legal, rational and reasonable; (b) whether the Industrial Court was clothed with the jurisdiction to determine a matter involving expulsion of trade union memberships; and (c) whether the award in allowing the first respondent's claim warranted the court's intervention to quash the same.

Held, granting the order of certiorari and order in terms of the application with costs:

(1) Since there were two provisions in two statutes that spelt out the difference between an 'employee' of a 'trade union' and a 'workman' of an ordinary 'employer', a harmonious construction in interpreting both s 2 of the TUA and s 2 of the IRA must be adopted to determine the true nature of the first respondent's legal position as the Selangor branch treasurer of the applicant. Given the applicant's position as a registered trade union, the statutory definition of 'trade-union' with 'employer' cannot be coalesced. The relationship between the applicant and the first respondent could not be said to be a 'workman-employer' relationship but instead an 'employee-trade union' relationship, created by virtue of the provisions in the TUA and the applicant's constitution, which was legally and significantly different. The first respondent's position as the full-time Selangor branch treasurer was not 'workman' as defined under s 2(1) of the TUA and s 2 of the IRA but instead he was an 'employee' as defined under s 2(1) of the TUA (see paras 24–25 & 29).

(2) The present matter was a case where the first respondent was aggrieved with his expulsion from the applicant as an officer or member of the applicant which did not constitute a trade dispute. In other words, this was not a case of dismissal under s 20(1) of the IRA. Since the first respondent was not directly appointed by the applicant but nominated and/or elected to become the Selangor branch treasurer, pursuant to r 25(1) of the applicant's constitution, the Industrial Court did not have the jurisdiction to disregard the applicant's election process and reinstate the first respondent's membership directly. The Industrial Court clearly did not have the jurisdiction to reinstate the first respondent as the full time Selangor branch treasurer because the first respondent's position was an 'employee', not a 'workman'. Having found that the first respondent was never a workman but a member of the applicant the issue of whether the first respondent was dismissed with just cause or excuse was irrelevant because there was no issue of dismissal of a workman in the first place (see paras 45, 50 & 66).

(3) The third issue was answered in the affirmative. The award was illegal, irrational and suffered severe procedural impropriety which warranted the court's intervention to quash the same (see para 67).

[Bahasa Malaysia summary

Ini adalah permohonan semakan kehakiman di mana pemohon memohon perintah certiorari untuk membatalkan award oleh responden kedua ('Mahkamah Perusahaan') dalam membenarkan tuntutan responden pertama untuk pemecatan tidak adil daripada pekerjaannya oleh pemohon dan memberikan sejumlah RM140,010 dalam bentuk upah tangguhan dan pampasan ('award'). Pemohon merupakan kesatuan sekerja yang berdaftar di bawah Akta Kesatuan Sekerja 1959 ('AKS') manakala responden pertama adalah bekas pekerja Holiday Inn On The Park, Kuala Lumpur ('hotel'). Semasa menjadi pekerja hotel, responden pertama telah dipilih sebagai Ahli Jawatankuasa Cawangan dan seterusnya menjadi Bendahari Cawangan Selangor pemohon. Walaupun responden pertama telah diberhentikan oleh hotel pada tahun 1999, beliau terus menjadi ahli dan kekal sebagai pegawai cawangan sepenuh masa pemohon. Dalam tempoh penggajian, responden pertama mengeluarkan gaji, bonus dan pemohon mencarum kepada Kumpulan Wang Simpanan Pekerja responden pertama. Sekitar Mei 2018, pemohon mendapat tahu bahawa responden pertama telah melakukan perbuatan salah laku yang serius dan oleh itu, pemohon telah menjalankan siasatan. Responden pertama telah diberikan surat tunjuk sebab dan dia memberi jawapan. Namun penjelasannya ditolak. Pemohon seterusnya mendakwa bahawa responden pertama juga telah menyalahgunakan dana pemohon dan menyebabkan kelulusan tuntutan yang tidak munasabah dan tidak berasas oleh Pengerusi dan Setiausaha Cawangan Selangor. Pemohon kemudian memutuskan untuk memecat responden pertama daripada keahliannya berkuat kuasa serta-merta. Di hadapan Mahkamah Perusahaan, responden pertama mendakwa bahawa dia adalah seorang pekerja seperti yang ditakrifkan di bawah Akta Perhubungan Perusahaan 1967 ('APP') dan bahawa pemecatannya daripada pekerjaannya dengan pemohon adalah tanpa sebab atau alasan yang adil dan memohon agar dia diterima semula jawatannya dahulu. Mahkamah Perusahaan, melalui award itu, memutuskan perkara itu dengan memihak kepada responden pertama. Oleh itu, permohonan ini. Isu untuk pertimbangan adalah: (a) sama ada Mahkamah Perusahaan dalam membuat kesimpulan bahawa responden pertama bukan ahli pemohon tetapi 'pekerja' dalam takrifan s 2 APP adalah sah, rasional dan munasabah; (b) sama ada Mahkamah Perusahaan mempunyai bidang kuasa untuk menentukan perkara yang melibatkan pemecatan keahlian kesatuan sekerja; dan (c) sama ada award dalam membenarkan tuntutan responden pertama mewajarkan campur tangan mahkamah untuk membatalkan perkara yang sama.

Diputuskan, membenarkan perintah certiorari dan perintah seperti dikehendaki dalam permohonan dengan kos:

(1) Oleh kerana terdapat dua peruntukan dalam dua statut yang menyatakan perbezaan antara 'pekerja' 'kesatuan sekerja' dan 'orang kerja' 'majikan' biasa, satu pembinaan yang harmoni dalam mentafsir kedua-dua s 2 AKS dan s 2 APP mesti diterima pakai untuk menentukan sifat sebenar kedudukan sah responden pertama sebagai bendahari cawangan Selangor pemohon. Memandangkan kedudukan pemohon sebagai kesatuan sekerja berdaftar, takrif berkanun 'kesatuan sekerja' dengan 'majikan' tidak boleh digabungkan. Hubungan antara pemohon dan responden pertama tidak boleh dikatakan sebagai hubungan 'orang kerja-majikan' tetapi sebaliknya hubungan 'pekerja-kesatuan sekerja', yang diwujudkan berdasarkan peruntukan dalam AKS dan perlembagaan pemohon, yang sah di sisi undang-undang dan ketara berbeza. Jawatan responden pertama sebagai bendahari sepenuh masa cawangan Selangor bukanlah 'orang kerja' seperti yang ditakrifkan di bawah s 2(1) AKS dan s 2 APP tetapi sebaliknya dia adalah 'pekerja' seperti yang ditakrifkan di bawah s 2(1) AKS (lihat perenggan 24–25 & 29).

(2) Perkara sekarang ialah kes di mana responden pertama terkilan dengan pemecatannya daripada pemohon sebagai pegawai atau anggota pemohon yang bukan merupakan pertikaian perdagangan. Dalam erti kata lain, ini bukan kes pemecatan di bawah s 20(1) APP. Memandangkan responden pertama tidak dilantik secara langsung oleh pemohon tetapi dicalonkan dan/atau dipilih untuk menjadi bendahari cawangan Selangor, menurut k 25(1) perlembagaan pemohon, Mahkamah Perusahaan tidak mempunyai bidang kuasa untuk mengabaikan proses pemilihan pemohon dan mengembalikan keahlian responden pertama secara langsung. Mahkamah Perusahaan jelas tidak mempunyai bidang kuasa untuk meletakkan semula responden pertama sebagai bendahari sepenuh masa cawangan Selangor kerana jawatan responden pertama adalah 'pekerja', bukan 'orang kerja'. Setelah mendapati responden pertama bukan pekerja tetapi ahli pemohon, isu sama ada responden pertama diberhentikan dengan sebab atau alasan yang adil adalah tidak relevan kerana tidak ada isu pemecatan pekerja pada mulanya (lihat perenggan 45, 50 & 66).

(3) Isu ketiga dijawab secara afirmatif. Award itu menyalahi undang-undang, tidak rasional dan mengalami ketidakwajaran prosedur yang teruk yang memerlukan campur tangan mahkamah untuk membatalkan perkara yang sama (lihat perenggan 67).]

Cases referred to

Actocorp Holdings Bhd v Helen Tang Chiew Yien [2005] 2 ILR 641, IC (refd)
Beh Keang Yu @ Baik Keang Yu v Fairtrio Marketing Sdn Bhd [2006] ILJU 69; [2006] 3 ILR 2037, IC (refd)
Harmony Plastic Sdn Bhd lwn Ng Swee Kee [2008] 2 LNS 1363, IC (refd)
Hoh Kiang Ngan v Mahkamah Perusahaan Malaysia & Anor [1995] 3 MLJ

369; [1996] 4 CLJ 687, FC (refd)
Inchcape Malaysia Holdings Bhd v RB Gray & Anor [1985] 2 MLJ 297; [1985] CLJ Rep 132, SC (refd)
Lau Yau Chai v Johore Mining & Stevedoring Co Sdn Bhd [1997] 1 MLJ 776; [1997] 1 CLJ Supp 459, HC (refd)
Page v Hull University Visitor [1993] 1 All ER 97, HL (refd)
Renesas Semiconductor (KL) Sdn Bhd v Menteri Sumber Manusia & Anor & Another Case [2015] 1 LNS 1452, HC (refd)
Syarikat Kenderaan Melayu Kelantan Bhd v Transport Workers' Union [1995] 2 MLJ 317, CA (refd)
Timbalan Ketua Polis Kelantan & Anor v Ishak bin Mansor [2012] 6 MLJ 503; [2012] 7 CLJ 149, CA (refd)
Visvasam v Singapore Toddy Tappers' Union [1968] 2 MLJ 205 (refd)

Legislation referred to

Companies Act 1965 (repealed by Companies Act 2016)
Emergency (Public Order and Prevention of Crime) Ordinance 1969
Industrial Relations Act 1967 ss 2, 2(1), 20, 20(1), (3), 30
Police (Conduct and Discipline) (Junior Police Officers and Constables) Regulations 1970
Public Officers (Conduct and Discipline) Regulations 1993
Trade Unions Act 1959 ss 2, 2(1), 26(1A), (1B), 28, 29, 29(1), (1)(a), 30, 62(1)
Trade Unions Regulations 1959

Ten Yee Phor (with Brendon Chia Ban Moon) (Ten & Colin) for the applicant.
Anthony Gomez (Gomez & Assoc) for the first respondent.

Noorin Badaruddin J:

[1] By way of this judicial review application, the applicant is seeking for an order of certiorari to quash the Award No 760 of 2020 ('award') wherein the second respondent ('Industrial Court') had allowed the first respondent's claim for unfair dismissal from his employment by the applicant and awarded a sum of RM140,010 in the form of backwages and compensation.

FACTS

[2] The applicant is a trade union registered under the Trade Union Act 1959, and that under the Rules and Constitution of the applicant Union ('applicant's Constitution'), the 'membership of Union shall be open to all employees excluding managerial staff, confidential staff and security guards in the Hotel, Bar and Restaurant in Peninsular Malaysia who are above the age of sixteen and whose place of work is in Peninsular Malaysia ...'.

[3] The facts set out by the learned Chairman in the award are as follows. A

[4] The first respondent was a former employer of Holiday Inn On The Park, Kuala Lumpur ('hotel'). Whilst being an employee of the hotel, the first respondent was elected as the branch committee member and subsequently became the branch treasurer of the applicant's Selangor branch. He was retrenched by the hotel on 13 July 1999. Nevertheless, by virtue of the provisions of the Trade Union Act 1959 he continued being a member of and remained the full time branch officer of the applicant. B

[5] The first respondent's position as a full time officer of the Branch was endorsed by the Executive Council ('EXCO') of the applicant on 15 May 1999 and the said endorsement was forwarded with Form L(1) to 'Jabatan Hal Ehwal Kesatuan Sekerja Selangor' on 16 August 1999 after the first respondent's retrenchment from the hotel. The first respondent then continued to serve as the branch officer of the applicant on a full time basis. C D

[6] In the course of the employment, the first respondent drew a salary, bonus and the applicant contributed to the first respondent's Employee Provident Fund ('EPF'). E

[7] Around May 2018, it came to the applicant's knowledge that the first respondent had committed acts of serious misconduct and in view of the seriousness of the misconduct, the applicant had carried out investigation on the alleged misconduct of the first respondent. F

[8] On 14 May 2018, at the applicant's EXCO meeting a unanimous decision was reached to issue the first respondent with a show cause letter requiring him to explain why disciplinary action against him should not be taken for allegedly instigating the applicant's members in Holiday Inn Glenmarie to go on picketing when there was no dispute as both the Holiday Inn Glenmarie and the applicant were still negotiating on the collective agreement. G

[9] The first respondent replied to the show cause letter on 25 May 2018. However, the applicant through its general secretary on the same day of the receipt of the first respondent's letter rejected the first respondent's explanation. The applicant further alleged that the first respondent had also misappropriated the applicant's funds together with two other persons and caused the approval of unreasonable and unsubstantiated claims by the Selangor branch chairman and secretary. H I

[10] The applicant then decided to expel the first respondent from its membership with immediate effect.

[11] Before the Industrial Court, the first respondent claimed that he is a workman as defined under the Industrial Relations Act 1967 ('the IRA') and that his dismissal from his employment with the applicant was without just cause or excuse and prayed for his reinstatement to his former position.

[12] The Industrial Court had, by the award, decided the matter in the first respondent's favour and awarded a sum of RM140,010 as backwages and compensation in lieu of reinstatement to him.

THE APPLICANT'S CONTENTIONS

[13] The crux of the applicant's contention is that the first respondent is not a workman within the definition of s 2 of the IRA. This contention was raised as a preliminary issue before the Industrial Court.

[14] It is the applicant's position herein that the Industrial Court has erred in finding that the first respondent is a workman pursuant to s 2 of the IRA and was employed under a contract of employment/service. The Industrial Court is argued to have erred in finding that the issue of the first respondent's expulsion as a member of the applicant does not arise and that his termination of employment is one of dismissal of a workman.

THE FIRST RESPONDENT'S CONTENTION

[15] The gist of the first respondent's contention is that the applicant did not fulfil the legal requirement in regularising his appointment as its branch treasurer and in the absence of such regularisation, the applicant's claim of him being a member of the applicant is unsubstantiated at the time of his dismissal. It is the first respondent's position that the Industrial Court has not erred in finding that he is a workman of the applicant.

FINDINGS

[16] In judicial review proceedings, the fundamental principle is that the courts will intervene with the powers of the public decision-making bodies to ensure that the powers are exercised lawfully and within the jurisdiction conferred upon them. In *Syarikat Kenderaan Melayu Kelantan Bhd v Transport Workers' Union* [1995] 2 MLJ 317, the Court of Appeal in expounding the general principles in judicial review had cited the case of *Page v Hull University Visitor* [1993] 1 All ER 97 where intervention of the courts through judicial review proceedings were succinctly set out by Lord Browne-Wilkinson as follows:

> In *Page v Hull University Visitor* [1993] AC 682 pp 701–702; [1993] 1 All ER 97 at p 107, Lord Browne-Wilkinson, delivering his speech for the majority (Lord

Mustili and Lord Slynn dissenting, but not on this issue), put an end to the fallacy that has plagued this area of public law for so long. He said:

> ... The fundamental principle is that the courts will intervene to ensure that the powers of public decision-making bodies are exercised lawfully. In all cases, save possibly one, this intervention by way of prohibition or certiorari is based on the proposition that such powers have been conferred on the decision-maker on the underlying assumption that the powers are to be exercised only within the jurisdiction conferred, in accordance with fair procedures and, in a *Wednesbury* sense (see *Associated Provincial Picture Houses Ltd v Wednesbury Corp* [1947] 2 All ER 680; [1948] 1 KB 223), reasonably. If the decision-maker exercises his powers outside the jurisdiction conferred, in a manner which is procedurally irregular or is *Wednesbury* unreasonable, he is acting ultra vires his powers and therefore unlawfully: see *Wade Administrative Law* (6th Ed, 1988) at p 39ff. The one possible exception to this general rule used to be the jurisdiction of the court to quash a decision taken within the jurisdiction of the decision-taker where an error of law appeared on the face of the record: *R v Northumberland Compensation Appeal Tribunal, ex p Shaw* [1952] 1 All ER 122; [1952] 1 KB 338.

[17] In the same case, Gopal Sri Ram JCA (as he then was) speaking on behalf of the Court of Appeal concluded as follows:

> ... in my judgment, *the true principle may be stated as follows. An inferior tribunal or other decision-making authority, whether exercising a quasi-judicial function or purely an administrative function, has no jurisdiction to commit an error of law. Henceforth, it is no longer of concern whether the error of law is jurisdictional or not. If an inferior tribunal or other public decision-taker does make such an error, then he exceeds his jurisdiction.* So too is jurisdiction exceeded, where resort is had to an unfair procedure (see *Raja Abdul Malek Muzaffar Shah bin Raja Shahruzzaman v Setiausaha Suruhanjaya Pasukan Polis* [1995] 1 MLJ 308), or where the decision reached is unreasonable, in the sense that no reasonable tribunal similarly circumstanced would have arrived at the impugned decision.
>
> *It is neither feasible nor desirable to attempt an exhaustive definition of what amounts to an error of law, for the categories of such an error are not closed. But it may be safely said that an error of law would be disclosed if the decision-maker asks himself the wrong question or takes into account irrelevant considerations or omits to take into account relevant considerations (what may be conveniently termed an Anisminic error) or if he misconstrues the terms of any relevant statute, or misapplies or misstates a principle of the general law.* (Emphasis added.)

[18] Returning to the present matter, The Industrial Court had delineated the preliminary issue in the award as follows:

> [9] Before this court proceeds to deal with the issue and make a finding whether the claimant was dismissed with or without just cause or excuse, it is incumbent upon this court to first determine whether the argument put forth by the union on the preliminary issue that the claimant is not a workman within the definition of s 2 of

A the Industrial Relations Act 1967 ('the Act') has any merits considering the peculiar facts of this case.

[10] In the event this court finds that the claimant is not a workman as defined under s 2 of the Act, then it will be incumbent upon this court to conclude that the claimant do not possess the right to make representation under s 20(1) of the Act.

B ...

[13] The preliminary issue in this matter giving rise to the question of whether the claimant is a workman within the definition of s 2 of the Act can be resolved if this court is able to determine whether the claimant at the time of the purported expulsion as a member of the union on the 20 July 2018 was in fact a member of the C union in light of the facts of the case. In the event this court concludes that the claimant's membership in the union is not proven, then the issue of expulsion of the claimant will not arise. In the event the issue of expulsion of the claimant does not arise, then the question of the termination of the claimant from his full time employment with the union must be dealt with by this court by making a finding D whether the claimant is a workman pursuant to the definition under s 2 of the Act and whether a contract of employment exist between the claimant and the union pursuant to the definition of the contract of employment as defined in s 2 of The Act.

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[19] The present matter could be determined by dealing with the followings core issues which are distilled from the preliminary issue raised before the Industrial Court:

F (a) whether the Industrial Court in concluding that the first respondent was not a member of the applicant but a 'workman' within the definition of s 2 of the IRA, is legal, rational and reasonable;

(b) whether the Industrial Court is clothed with the jurisdiction to determine a matter involving expulsion of trade union memberships; G and

(c) whether the award in allowing the first respondent's claim therein warrants the court's intervention to quash the same.

H *The first issue — Whether the Industrial Court in concluding that the first respondent was not a member of the applicant but a 'workman' within the definition of s 2 of the IRA, is legal, rational and reasonable*

[20] The learned chairman of the Industrial Court had decided as follows:

I [18] Accordingly, this court now makes a finding that the claimant is a workman pursuant to s 2 of the Act and was employed by the union under a contract of employment/service. The issue of the expulsion of the claimant as a member of the union does not arise henceforth. The claimant's termination of employment is one of dismissal of a workman.

[21] It is therefore pertinent to look at the relevant provisions of the Trade Unions Act 1959 and the IRA.

[22] Section 2(1) of the Trade Unions Act 1959 defines 'employee', 'employer', 'trade union' and 'workman' as follows:

> 2 Interpretation
>
> (1) In this Act, unless the context otherwise requires or it is otherwise expressly provided —
>
> *'employee', when used with reference to a trade union* or political party *means any person who is engaged for hire or reward on a full-time or part-time basis'*
>
> *'employer' means any person or body of persons, whether corporate or unincorporate, who employs a workman*, and includes the Government and any statutory authority;
>
> *'trade union'* or 'union' *means any association or combination of workmen or employers*, being workmen whose place of work is in Peninsular Malaysia, Sabah or Sarawak as the case may be, or employers employing workmen in Peninsular Malaysia, Sabah or Sarawak, as the case may be —
>
> (a) within any particular establishment trade, occupation or industry or within any similar trades, occupations or industries: and
>
> (b) whether temporary or permanent; and
>
> (c) having among its objects one or more of the following objects —
>
> (i) the regulation of relations between workmen and employers, for the purposes of promoting good and harmonious industrial relations between workmen and employers, improving the working conditions of workmen or enhancing their economic and social status, or increasing productivity;
>
> (ia) the regulation of relations between workmen and workmen, or between employers and employers;
>
> (ii) the representation of either workmen or employers in trade disputes;
>
> (iia) the conducting of, or dealing with, trade disputes and matters related thereto; or
>
> (iii) the promotion or organisation or financing of strikes or lock-outs is any trade or industry or the provision of pay or other benefits for its members during a strike or lockout;
>
> *'workman' means any person*, including an apprentice*, employed by an employer under a contract of employment to work for hire or reward* and for the purposes of any proceedings in relation to a trade dispute *includes any such person who has been dismissed, discharged or retrenched* in connection with or as a consequence of that dispute or *whose dismissal, discharge or retrenchment has led to that dispute*. (Emphasis added.)

[23] Section 2 of the IRA does not have a specific definition for 'employee' but has nevertheless defined 'employer', 'trade union' and 'workman' as follows:

A 2 Interpretation

In this Act, unless the context otherwise requires:

'employer' means any person or body of persons, whether corporate or unincorporate, *who employs a workman under a contract of employment*, and includes the Government and any statutory authority, unless otherwise expressly stated in this Act;

B

'trade union' means any trade union registered under any law relating to the registration of trade unions;

'workman' means any person, including an apprentice, *employed by an employer under a contract of employment to work for hire or reward* and for the purposes of any proceedings in relation to a trade dispute *includes any such person who has been dismissed, discharged or retrenched* in connection with or as a consequence of that dispute or *whose dismissal, discharge or retrenchment has led to that dispute.* (Emphasis added.)

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D

[24] Since there are two provisions in two statutes that spell out the difference between an 'employee' of a 'trade union' and a 'workman' of an ordinary 'employer', a harmonious construction in interpreting both s 2 of the Trade Unions Act 1959 and s 2 of the IRA must be adopted to determine the true nature of the first respondent's legal position as the Selangor branch treasurer of the applicant. It is a rule of statutory interpretation that statutes cannot be read in isolation. In *Timbalan Ketua Polis Kelantan & Anor v Ishak bin Mansor* [2012] 6 MLJ 503; [2012] 7 CLJ 149, several provisions of the law were dealt with by the court in relation to a disciplinary authority issuing a show cause notice against a police personnel. At that material time, there were two regulations in force governing the disciplinary matters of the police force, ie the Police (Conduct and Discipline) (Junior Police Officers and Constables) Regulations 1970 and the Public Officers (Conduct and Discipline) Regulations 1993. Having issued the said show cause notices, the Deputy Minister of Home Affairs issued a restriction order under the Emergency (Public Order and Prevention of Crime) Ordinance 1969 against the respondent. By virtue of the Public Officers (Conduct and Discipline) Regulations 1993, the appellants issued a suspension letter followed by a punishment of dismissal on the respondent with effect from the date of restriction order. The respondent challenged the validity of the restriction order in the High Court. The High Court allowed the respondent's claim on the grounds, amongst others, that the respondent, being a junior police officer, could only be subject to one disciplinary regulation. In allowing the appellant's appeal, the Court of Appeal expressed the followings:

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[38] *We take the view that the provisions of the Federal Constitution, the Police Act as well as the 1970 and 1993 Regulations must be read together and be given a harmonious construction.* Our reading of the legal provisions referred to us in arguments are as follows. Every police officer unless expressly excluded is subject to the same provisions as are applicable to other public officers of corresponding status in the

service of the Government of Malaysia (s 74 Police Act). Pursuant to art 132 of the Federal Constitution a member of the police force is a member of the public service.

[39] All members of the Police Force are also subject to regulations relating to discipline as may from time to time be made by the Yang di-Pertuan Agong under art 132(2) of the Federal Constitution or under s 96 of this Act (s 18 of the Police Act). This would in our view also include junior police officers.

[40] *With respect, we are unable to agree with the learned judge's ruling that a junior police officer can only be subjected to only one disciplinary regulations. There is no such general principle. A junior police force can certainly be subjected to more than one.* Whether or not a particular regulation is applicable to such an officer must necessarily depend on the express words used in that regulations. In this case the applicability of the 1993 regulations to an officer such as the plaintiff must certainly be determined by examining the provisions of the 1993 Regulations itself. (Emphasis added.)

[25] Section 2(1) of the IRA has specifically provided that a workman must be employed by an employer. Given the applicant's position as a registered trade union, the statutory definition of 'trade-union' with 'employer' cannot be coalesced. It must be borne in mind that the first respondent was nominated and elected/voted to become the Selangor branch treasurer. It cannot be disputed that only members of the applicant could be elected for an executive position which explains the first respondent's attainment of the Selangor branch treasurer's position in the applicant. It is of the considered view that the relationship between the applicant and the first respondent cannot be said to be a 'workman-employer' relationship but instead an 'employee-trade union' relationship, created by virtue of the provisions in the Trade Unions Act 1959 and the applicant's Constitution, which is legally and significantly different.

[26] The Industrial Court had, at para 15 of the award stated as follows:

[15] As the claimant was no longer an employee of the hotel, Bar and Restaurant Industry, by virtue of r 3(1) and (6) of the Union's Constitution, the claimant ceased to be a member of the union automatically and therefore by virtue of r 11 of the Union's Constitution he cannot be elected or act as an officer of the union since the claimant is no longer a member of the union. The claimant also did not fulfil the provision of s 29 of the Trade Unions Act 1959 ...

[27] The finding of the Industrial Court quoted in the above cannot be right. This court says so because despite the first respondent's retrenchment by the hotel on 13 July 1999, he was not deprived of his membership in the applicant as he was appointed as the full-time Selangor branch treasurer by the applicant on the same day pursuant to rr 11(3) and 12(11) of the applicant's Constitution. This is reflected on the first respondent's sealed and certificate Form L(1) dated 23 August 1999 wherein it was clearly stated that his occupation was a 'Full-Time branch treasurer' of the applicant which took effect on 13 July 1999.

[28] Rules 11(3) and 12(11) of the applicant's Constitution are reproduced:

> 11(3) Subject to the approval of a delegate conference, the Executive Council shall have the power to employ persons as it deems necessary. Provided that no such employee shall be an officer of the Union (unless he is exempted under the provisions of Section 30 of the Trade Union Ordinance, 1959) or shall act in such a manner as to make it appear that he has been entrusted with the management of affairs of the Union. Provided further that no person shall be thus employed if:
>
> (a) he is not a citizen of the Federation; or
>
> (b) he has been convicted by any Court of a criminal offence and has not received a free pardon in respect thereof and such conviction in the opinion of the Registrar of Trade unions renders him unfit to be employed by a trade union; or
>
> (c) he is an officer or an employee of any other trade union; or
>
> (d) he is an officer or employee of a political party.
>
> 12(11) The Executive Council shall give instructions to the General Secretary and other officers of the Union for the conduct of the affairs of the Union. It may subject to the provisions of Rule 11, paragraph 3, employ such persons as it deems necessary to carry on the day-to-day administration of the Union and fix their remuneration. It may suspend or dismiss any officer or member of the staff for neglect of duty, dishonest, incompetence, refusal to carry out the decisions of the Executive Council, or for any other reason which it deem good and sufficient in the interest of the Union.

[29] It can be comprehended that the first respondent's position as the full-time Selangor branch treasurer is not a 'workman' as defined under s 2(1) of the Trade Unions Act 1959 and s 2 of the IRA but instead he is an 'employee' as defined under s 2(1) of the Trade Unions Act 1959. This court is compounded by the fact that upon the first respondent's employment as the full-time Selangor branch treasurer on 13 July 1999, his membership in the applicant was retained and remained valid in law pursuant to s 26(1A) of the Trade Unions Act 1959 which shall be read together with ss 26(1B) and 29(1) of the Trade Unions Act 1959. Sections 26(1A), 26(1B) and 29(1) of the Trade Unions Act 1959 are reproduced:

> 26(1A) *No person shall join, or be a member of, or be* accepted *or retained as a member by, any trade union if he is not employed or engaged in any establishment, trade, occupation or industry in respect of which the trade union is registered.*
>
> (1B) *For the purpose of subsection (1A), any person who is employed by a trade union as member of its executive under paragraph (a) of the proviso to subsection 29(1) shall be deemed to be employed or engaged in the establishment, trade, occupation or industry concerned.* (Emphasis added.)
>
> 29(1) *A registered trade union may, subject to subsection (2) and of the rules of such union, employ and pay* a secretary, *treasurer* and such other persons as may be

necessary *for the purposes of such union or of any federation of trade unions to which the union belongs*:

Provided that no employee of such union other than —

(a) *the holder of a full-time office as* secretary, assistant secretary, *treasurer* or assistant treasurer *who is elected in accordance with the rules of such union*; or

(b) a secretary, assistant secretary, treasurer or assistant treasurer who is employed as such immediately before the commencement of this paragraph and possessing no power of voting in respect of the affairs of such union or of any of its committees,

shall be a member of the executive of such union. (Emphasis added.)

[30] The amendment to s 26(1A) and the introduction of s 26(1B) of the Trade Unions Act 1959 came into force on 10 February 1989 pursuant to the Trade Unions (Amendment) Act 1989. The extract of the Parliament's Hansard dated 12 October 1988 during the tabling of the amendment bill to amend the said s 26(1A) and s 26(1B) is highlighted to this court where the relevant Minister expressly stated as follows:

> Pindaan yang dicadangkan di bawah fasal 6 adalah bertujuan menjadikan seksyen 26(1A) lebih jelas dan tepat untuk memastikan bahawa seseorang pekerja tidak boleh menganggotai atau terus menjadi ahli suatu kesatuan jika ia tidak digaji dalam tred, pekerjaan atau industri yang ada kaitan dengan kesatuan itu. Peruntukkan yang ada sekarang kurang jelas sama ada seseorang yang telah masuk menjadi ahli kesatuan dan kemudiannya berhenti dari digaji dalam tred, pekerjaan atau industri berkenaan boleh mengekalkan keahliannya. *Walau bagaimanapun, seseorang yang dipilih ofeh ahli-ahli kesatuan dan digaji untuk bekerja sepenuh masa sebagai Setiausaha, Penolong Setiausaha, Bendahari atau Penolong Bendahari Kesatuan menurut seksyen 29(1)(a) adalah dianggap sebagai digaji dalam tred, pekerjaan atau industry yang berkenaan.* (Emphasis added.)

[31] It must be repeated that whilst the first respondent was employed by the hotel, he was elected as the branch committee member on 20 January 1998. He was subsequently nominated and elected as the Selangor branch treasurer of the applicant on 1 February 1998. Simultaneously, he was appointed as a full-time Selangor branch treasurer effectively on 13 July 1999 following the applicant's EXCO approval of the circular letter dated 3 July 1999, which was made pursuant to rr 11(3), 12(5) and 12(11) of the applicant's Constitution as well as s 29(1)(a) of the Trade Unions Act 1959.

[32] On 13 July 1999, notwithstanding his retrenchment by the hotel, the first respondent's employment as the full-time Selangor branch treasurer of the applicant began to take effect. This is corroborated by the applicant's declaration in the first respondent's sealed and certificate Form L(1) dated 23 August 1999 that he was entitled to hold the Selangor branch treasurer's position pursuant to s 29 of the Trade Unions Act 1959 which was

unchallenged, uncontroverted and unprotested by the first respondent.

[33] Further, by virtue of s 26(1B) of the Trade Unions Act 1959, the first respondent remained as employee of the Hotel, Bar and Restaurant Industry. In addition, pursuant to s 26(1A) of the Trade Unions Act 1959 the applicant had thus retained and continued the first respondent's membership in the applicant in light of his position as the full-time Selangor branch treasurer. The said membership remained valid in law despite his retrenchment by the hotel.

[34] In support of the above finding, the case of *Renesas Semiconductor (KL) Sdn Bhd v Menteri Sumber Manusia & Anor & Another Case* [2015] 1 LNS 1452 ('*Renesas*'s case') is highlighted. In that case one Mr Bruno, an employee of a company known as Mel Systems, was simultaneously appointed and employed as the full-time secretary general of the respondent union therein on 8 January 2010. On 29 January 2010, Mel Systems ceased to operate but notwithstanding the aforesaid, on 6 September 2011, Mr Bruno signed and issued a statutory form on behalf of the respondent union to the applicant company concerned in order to claim recognition. The applicant company had, through several written letters and a meeting with the Department of Industrial Relations, questioned the eligibility of Mr Bruno to sign the said statutory form. The Trade Union Affairs had responded confirming the eligibility of Mr Bruno to sign the statutory form because Mr Bruno's position as a full-time secretary general of the union respondent, which was approved at the respondent union's inaugural triennial delegates conference, was within the ambit of s 26(1B) and s 29(1)(a) of the Trade Unions Act 1959. Dissatisfied with the Trade Union Affair's decision, the applicant company filed a judicial review application seeking, amongst others, to nullify the said statutory form on the grounds that Mr Bruno was not a member of the respondent union pursuant to s 26(1A) of the Trade Unions Act 1959. The High Court held as follows:

> 26. Section 29 of the TUA had made provision for a full time secretary general to be employed by a trade union. A full time secretary general is a position equivalent to that of a secretary.
>
> 27. Section 29(1) of the TUA provides:
>
> > A registered trade union may, subject to subsection (2) and the rules of such union, employ and pay secretary, treasurer and such other persons as may be necessary for the purposes of such union or of any federation of trade unions to which the union belongs: Provided that no employee of such union other than —
> >
> > (a) the holder of a full-time office as secretary, assistant secretary, treasurer or assistant treasurer who is elected in accordance with the rules of such union; or
> >
> > (b) the secretary, assistant secretary, treasurer or assistant treasurer who

is employed as such immediately before the commencement of this paragraph and possessing no power of voting in respect of the affairs of such union or of any of its committees,

Shall be a member of the executive of such union.

28. Based on the above provisions, Mr Bruno had been appointed as a Secretary General at the time he was employed by MEL Systems and apart from that he was also employed as a full-time salaried Secretary General of the second respondent on 8 January 2010. Therefore, pursuant to the above provisions Mr Bruno shall be a member of the executive of the second respondent.

29. Therefore, the first respondent had referred to the correct section of the law and was guided by ss 29(1) and 26 of the TUA. Section 26 of the TUA provides as follows:

(1A) No person shall join, or be a member of, or be accepted or retained as a member by, any trade union if he is not employed or engaged in any establishment, trade, occupation or industry in respect of which the trade union is registered.

(1B) For the purpose of subsection (1A), any person who is employed by a trade union as a member of its executive under paragraph (a) of the proviso to subsection 29(1) shall be deemed to be employed or engaged in the establishment, trade, occupation or industry concerned.

30. The above-mentioned subsection had deemed Mr Bruno who was employed or engaged as Secretary General of the second respondent as a person employed or engaged in the establishment, trade, occupation or industry concerned.

31. Subsection 26(1A) and (1B) of the TUA shall be read with sub-s 29(1) of the TUA.

32. Further the Constitution of the second respondent does not prohibit a full-time Secretary General to sign Form A. Regulation 11(3) of the second respondent's Constitution provides as follows:

Majlis Eksekutif berkuasa menggaji pekerja-pekerja sepenuh masa yang difikirkan perlu setelah mendapat kelulusan Mesyuarat Agung Tiga tahunan. Seseorang pekerja Kesatuan selain daripada mereka yang tersebut dalam 'proviso' kepada seksyen 29(1) Akta Kesatuan Sekerja 1959, tidak boleh menjadi pegawai Kesatuan atau bertugas dan bertindak sedemikian rupa sehingga urusan hal ehwal Kesatuan seolah-olah dalam pengawalannya.

33. A full-time Secretary General is a position equivalent to that of a secretary, and therefore Mr Bruno was eligible to sign Form A.

34. The first respondent had referred to the correct section of the law and was guided by ss 29(1) and 26 of the TUA at the time the decision was made. Therefore, the first respondent could not be said to have acted outside the scope of the relevant law in arriving at the said decision. The first respondent's reasons as stated in the encl 10 is in consonant with s 29(1) of the TUA read together with s 26(1A) and 26(1B) of the same Act as discussed above showed that Mr Bruno has the necessary mandate to sign Form A for purposes of recognition.

[35] Similarly, in the instant matter, the first respondent was still a member of the applicant pursuant to s 29(1) to be read together with ss 26(1A) and 26(1B) of the Trade Unions Act 1959 in light of his employment as a full-time Selangor branch treasurer of the applicant having commenced on 13 July 1999, which was the same day where he was retrenched by the hotel.

[36] It must be further highlighted that the first respondent had knowingly offered himself to be nominated to contest for the position as the Selangor branch treasurer for the 2018/2021 term, which he subsequently won. Without such valid membership, the first respondent would not be entitled to contest for the said position and there is no evidence to show that the first respondent was unaware of his active membership in the applicant. Importantly, in the nomination form which was received by the applicant on 3 April 2018 the first respondent had clearly and unequivocally stated that he had served as the Selangor branch treasurer of the applicant Union for nineteen 19 years.

[37] The fact that the first respondent had failed to oppose and/or challenge the Selangor Bbranch of the applicant in filing, sealing and certifying his Form L to the Director General of Trade Unions ('DGTU') coupled by his conduct in paying the membership subscription fees fortify that he was very well aware of his active membership in the applicant. As such, it is incontrovertible evidence that the first respondent was an 'employee' cum member of the applicant. The first respondent cannot be categorised as a 'workman' under s 2(1) of the Trade Unions Act 1959 and s 2 of the IRA.

[38] The Industrial Court's decision that the first respondent's membership in the applicant had ceased automatically at the time when he ceased to be an employee of the hotel is irrational as it cannot be perceived how the first respondent was able to contest for an executive position in the applicant for the 2018/2021 term without a valid membership.

[39] The first respondent however had stressed that he was not a member of the applicant due to:

(a) the applicant's failure to seek for an exemption from the Minister of Human Resources to validate his continuation as an officer of the applicant pursuant to s 30 of the Trade Unions Act 1959 following his loss of employment in the hotel industry; and

(b) the applicant's failure to respond to the DGTU's letter dated 16 November 2001.

[40] In relation to the first issue it is of the considered view that there was no necessity for the applicant to apply for the said exemption under s 30 of the

Trade Unions Act 1959 when it was an indisputable fact that the first respondent had remained as a member of the applicant pursuant to s 26(1A) of the Trade Unions Act 1959 in view of his position as the full-time Selangor branch treasurer. Importantly, the fact that the first respondent had continuously paid his monthly union's membership subscription fees is a confirmation on his part that he was a member of the applicant at all material times.

[41] Section 30 of the Trade Unions Act 1959 provides:

> 30 Power of Minister in relation to Sections 28 and 29 The Minister may by order —
>
> (a) declare that section 28 or 29 shall not apply to any registered trade union or class of registered trade unions specified in the order; or
>
> (b) grant, either absolutely or subject to such conditions as he may consider reasonably necessary, exemption from all or any of the provisions of section 28 or 29 in respect of officers or employees or such proportion or class of officers or employees of any registered trade union or class of registered trade unions as may be specified in the order.

[42] Meanwhile, s 28 of the Trade Unions Act 1959 provides:

> 28 Officers
>
> (1) A person shall not be or act as a member of the executive of a trade union or any branch thereof, or of any federation of trade unions, and shall be disqualified for election as such member, if —
>
> (a) he is not a citizen of the Federation;
>
> (b) (Deleted by Act A 1324: s 9);
>
> (c) he has been a member of the executive of any trade union the registration of which has been cancelled or withdrawn under subparagraph 15(1)(b)(iv), (v) or (vi) or under any law repealed by this Act;
>
> (c1) he is an office-bearer or employee of a political party;
>
> (d) he has been convicted by any court of law of criminal breach of trust, extortion or intimidation, or of an offence under section 49, 50 or 50A or of any offence which in the opinion of the Director General renders him unfit to be an officer of a trade union; or
>
> (e) he is a bankrupt:
>
> Provided that paragraphs (a) and (b) shall not apply in the case of a union which, in the opinion of the Minister, is required by its objects to represent persons or the interests of persons who are not resident in Peninsular Malaysia, Sabah or Sarawak, as the case may be.
>
> (2) Where the Director General certifies in writing to the executive of a trade union or a federation of trade unions that any person who is a member of the executive of

A that union or federation is disqualified from being a member of such executive, specifying in such certification the grounds on which such person is so disqualified, such person shall immediately thereupon cease to be a member of such executive.

B **[43]** Premised on the aforesaid sections, it is of the considered view that there was no necessity to refer to s 28 of the Trade Unions Act 1959 for the simple reason that none of the subsections thereof is applicable to the first respondent's circumstance herein. The first respondent was a member of the applicant in light of his position as the full-time Selangor branch treasurer pursuant to s 29(1) of the Trade Unions Act 1959 which shall be read together with s 26(1A) and s 26(1B) of the Trade Unions Act 1959. Therefore, there was no necessity for the applicant to apply for an exemption from the Honourable Minister of Human Resources pursuant to s 30 of the Trade Unions Act 1959 to validate the first respondent's continuation as a member of the applicant when his membership was retained by the applicant and remained valid in law pursuant to s 26(1A) of the Trade Unions Act 1959.

C

D

E **[44]** In regards to the second issue raised by the first respondent, the applicant's non-response to the DGTU's letter dated 16 November 2001 should not and could not invalidate the first respondent's status as the full-time Selangor branch treasurer. If at all, the said non-response would only attract a monetary penalty in a sum not exceeding one thousand Ringgit Malaysia (RM1,000) against the applicant irresponsible employees pursuant to s 62(1) of the Trade Unions Act 1959. As such, for the Industrial Court to take the applicant's said non-response to the DGTU's said letter dated 16 November 2001 into consideration in concluding that the first respondent's membership in the applicant had ceased, the Industrial Court has usurped the powers of the DGTU. There is clearly no requirement for the applicant to obtain any exemption pursuant to s 30 of the Trade Unions Act 1959 in order to continue the membership of the first respondent when the latter was never divested of his membership in law.

F

G

The second issue: Whether the Industrial Court is clothed with the jurisdiction to determine a matter involving expulsion of trade union memberships

H

[45] Under the IRA, the Industrial Court can only grant an award in favour of a workman as defined under s 2 of the IRA and s 2(1) of the Trade Unions Act 1959 who is involved in a trade dispute and/or any proceeding referred to it by the Minister of Human Resources pursuant to s 20(3) of the IRA. This court finds that the present matter is a case where the first respondent is aggrieved with his expulsion from the applicant as an officer or member of the applicant which does not constitute a trade dispute. In other words, this is not a case of dismissal under s 20(1) of the IRA.

I

[46] Section 2 of the IRA defines 'award', 'trade dispute' as follows:

> 2 Interpretation
>
> In this Act, unless the context otherwise requires —
>
> 'award' means an award made by the Court in respect of any trade dispute or matter referred to it or any decision or order made by it under this Act;
>
> 'trade dispute' means any dispute between an employer and his workmen which is connected with the employment or non-employment or the terms of employment or the conditions of work of any such workmen.

[47] Sections 20 of the IRA provides:

> 20 Representations on dismissals
>
> (1) Where a workman, irrespective of whether he is a member of a trade union of workmen or otherwise, considers that he has been dismissed without just cause or excuse by his employer he may make representations in writing to the Director General to be reinstated in his former employment; the representations may be filed at the office of the Director General nearest to the place of employment from which the workman was dismissed.
>
> ...
>
> (2) Upon receipt of the representations the Director General shall take such steps as he may consider necessary or expedient so that an expeditious settlement thereof is arrived at.
>
> ...
>
> (3) Where the Director General is satisfied that there is no likelihood of the representations being settled under subsection (2), the Director General shall refer the representations to the Court for an award.

[48] Meanwhile, s 30 of the IRA provides:

> 30 Awards
>
> (1) The Court shall have power in relation to a trade dispute referred to it or in relation to a reference to it under subsection 20(3), to make an award (including an interim award) relating to all or any of the issues.
>
> ...
>
> (6) In making its award, the Court shall not be restricted to the specific relief claimed by the parties or to the demands made by the parties in the course of the trade dispute or in the matter of the reference to it under subsection 20(3) but may include in the award any matter or thing which it thinks necessary or expedient for the purpose of settling the trade dispute or the reference to it under subsection 20(3).

[49] The first respondent's dispute herein is neither a trade dispute nor a dispute wherein he was dismissed, discharged or retrenched by an employer but rather, a membership disciplinary matter of the applicant where the first

respondent was expelled as a member effectively on 20 July 2018 pursuant to r 12(13) of the applicant's Constitution following his alleged misconduct for instigating the applicant's members to go on picketing.

[50] Since the first respondent was not directly appointed by the applicant but nominated and/or elected to become the Selangor branch treasurer through the Triennial General Meetings pursuant to r 25(1)(a) of the applicant's Constitution, the Industrial Court does not have the jurisdiction to disregard the applicant's election process and reinstate the first respondent's membership directly. The Industrial Court clearly does not have the jurisdiction to reinstate the first respondent as the full-time Selangor branch treasurer because the first respondent's position was an 'employee', not a 'workman'.

[51] Pertinently, the Industrial Court had failed to give consideration whether the first respondent was employed under a contract of service or engaged under a contract for service or an appointment pursuant to s 26(1A) and 26(1B) to be read with s 29(1) of the Trade Unions Act 1959. Instead, the Industrial Court proceeded to conclude that the first respondent was a workman of the applicant by virtue of the applicant's circular letter dated 3 July 1999. The said circular letter was not even addressed specifically to the first respondent. The said circular letter did not fully embody the terms and conditions of which a proper contract of service/employment would have in nature. The said circular letter did not state the scope of the first respondent's duties and responsibilities, the termination clause, annual leave entitlement, working hour's clause, the person to whom the first respondent's had to report to etc.

[52] The first respondent himself had failed to show any letter of appointment and/or documentary evidence to justify a workman-employer relationship between him and the applicant. It can be clearly understood that the circular letter was just a request for the approval of the EXCO to employ the first respondent as the full-time Selangor branch treasurer.

[53] The Industrial Court further failed to consider the crucial question of 'the degree of control' exercised by the applicant in determining whether the first respondent was indeed employed under a contract of service in his capacity as the Selangor branch treasurer. The Federal Court in *Hoh Kiang Ngan v Mahkamah Perusahaan Malaysia & Anor* [1995] 3 MLJ 369; [1996] 4 CLJ 687 had clearly expressed as follows:

> In all cases where it becomes necessary to determine whether a contract is one of service or for services, *the degree of control which an employer exercises over a claimant is an important factor, although it may not be the sole criterion.* The terms of the contract between the parties must, therefore, first be ascertained. Where this is in

writing, the task is to interpret its terms in order to determine the nature of the latter's duties and functions. Where it is not then its terms must be established and construed. But in the vast majority of cases there are facts which go to show the nature, degree and extent of control. These include, but are not confined to, the conduct of the parties at all relevant times. Their determination is a question of fact. When all the features of the engagement have been identified, it becomes necessary to determine whether the contract falls into one category or the other, that is to say, whether it is a contract of service or a contract for services.

[54] This court further finds that the Industrial Court had erred in arriving at the conclusion that the EPF contribution made in favour of the first respondent shows that the latter was a workman of the applicant. This court agrees with the applicant's learned counsel's submission that in determining whether an individual is a workman as defined under s 2 of the IRA, it is essentially a mixed question of fact and law. The overall circumstances and all features as to how the first respondent became the full-time Selangor branch treasurer of the applicant must be assessed.

[55] On behalf of the applicant, learned counsel argued before the court that being the Selangor branch treasurer, he was certainly not an ordinary personnel but one of the directing minds and brains who had responsibilities in the management of the Selangor branch of the applicant, similar to the functions of a director in the management level of a company. Amongst others, it is not disputed that the first respondent, together with the branch chairman and Branch Secretary, signed all cheques of the Selangor branch pursuant to rr 29(8) and 32(4) of the applicant's Constitution.

[56] Learned counsel further argued that it is trite law that any director who represents the minds and brains of the company and is authorised to administer and manage the company shall not be classified as a workman. In support of the argument, the classic case of *Inchcape Malaysia Holdings Bhd v RB Gray & Anor* [1985] 2 MLJ 297; [1985] CLJ Rep 132 ('*Inchcape*'s case') is highlighted to this court. Although *Inchcape*'s case was subsequently distinguished by the later cases on the grounds that directors can be workman in this modern era, George Edward Seah SCJ (as he then was) had made an important remark about the role of directors which was still relevant to date. The learned judge stated:

The question is whether a Company Director inciudes a 'workman' within the meaning of s 2 of the Industrial Relations Act 1967 (as amended). I have already said that the Act postulates that there should be an employer on the one side and workman on the other side. *A Company Director has been said to representing the directing mind and will of the company, the very ego and centre of the personality of the company* (*Lennard's Carrying Co Ltd v Asiatic Petroleum Co Ltd* [1915] AC 705 per Viscount Haldane LC at p 713 and Denning LJ in *HL Bolton (Engineering) Ltd v TJ Graham & Sons Ltd* [1956] 3 All ER 624) ... *If a person or a company director can*

be regarded either expressly or by necessary implication, as representing the company in the course of the trading activities of the company, he ought not to be treated as a workman under the Act Some support for this proposition may be found in *Bolton Engineering* case at p 630 where Denning LJ said:

> *Others are directors and managers who represent the directing mind and will of the company and control what they do. The state of mind of these directors and managers is the state of mind of the company and is treated by the law as such.* (Emphasis added.)

[57] The High Court in *Lau Yau Chai v Johore Mining & Stevedoring Co Sdn Bhd* [1997] 1 MLJ 776; [1997] 1 CLJ Supp 459 had reiterated the principle laid down in the *Inchcape*'s case and held as follows:

> In the result the principle laid down in *Inchcape* remained intact in the sense that a person who represents the directing mind and will of the company, the very ego and centre of the personality of the company is not a workman within the meaning of s 2 of the Act for he is being placed in a position to determine and formulate the company's policy ... It is for the Industrial Court to decide as a preliminary issue upon any objection raised as to whether a particular claimant is or is not a workman in order to clothe it with the jurisdiction to determine the merits of the claim.

[58] Later in *Harmony Plastic Sdn Bhd lwn Ng Swee Kee* [2008] 2 LNS 1363 the court had held the followings:

> Dengan kedudukan yang menuntut itu sebagai pemegang saham dan pengarah syarikat, peranan serta cara yang menuntut melaksanakan fungsi dan tugasnya itu menunjukkan yang menuntut seorang yang berotoriti dan diberi kuasa penuh dalam mengawal urusan harian syarikat khususnya menyelia dan memantau pekerja, pemasaran, pentadbiran dan kewangan syarikat. Adalah jelas yang menuntut merupakan nadi syarikat yang menentukan dan melaksanakan polisi syarikat serta mengawasi operasi harian syarikat. Kedudukan yang menuntut ditempatkan ditempat yang tertinggi dalam pengurusan syarikat. Keadaan sedemikian merupakan ciri-ciri bukan seorang pekerja tetapi seorang yang berciri dan berkhidmat melampaui sebagai seorang pekerja biasa syarikat.

[59] Upon examining the facts and circumstances of the present matter and having read the authorities cited, this court is of the considered view that the first respondent, being the Selangor branch treasurer of the applicant who is akin to a director of a company, was one of the directing minds and brains of the applicant. Support can be found by the fact that the duties and responsibilities of the first respondent as the Treasurer under r 29(8) of the applicant's Constitution, are stated to be:

(a) that he shall be responsible for all monies received and paid by him on behalf of the applicant and for the proper keeping and posting of books of account as required under the Trade Unions Regulations 1959;

(b) that he shall issue an official receipt for each and every sum of money received by him and no other officer or employee of the applicant at the Selangor branch shall receive money or issue receipts without the specific authority of the branch chairman given in writing on each and every occasion;

(c) that he shall be responsible for the safe custody of all books or account or subsidiary documents at the branch office and shall not remove them from the official place of business without the specific authority of the applicant's President given in writing on each and every occasion;

(d) that he shall, in conjunction with the branch chairman and the Branch Secretary, operate the bank account of the Branch; and

(e) that he shall be personally responsible for all monies and other property of the applicant which pass through his hands.

[60] Further functions of the first respondent as the Selangor branch treasurer are set forth in r 32(4) of the applicant's Constitution as follows:

(a) that he shall, in conjunction with the branch chairman and the Branch Secretary, operate the Selangor branch bank account to manage the branch funds;

(b) that he shall be allowed a petty cash not exceeding RM50 at any time, and no expenditure exceeding RM50 at any one time shall be incurred by him without the prior sanction of the Branch Committee; and

(c) all moneys which belong to the applicant and which do not constitute the petty cash shall be deposited by the first respondent within a stipulated timeline in the approved bank.

[61] Premised on the aforesaid rules, as the Selangor branch treasurer of the applicant, the first respondent cannot be said to be an ordinary personnel who was subject to severe control by the applicant. In holding a post with responsibilities such as being in charge of the finance, the sole receipt issuer, keeping safe custodies of the books and accounts of the applicant as well as being a joint signatory for any outgoing cheques with the branch chairman and Brach Secretary, the first respondent was clearly holding a very important position in the Selangor branch of the applicant and such position is tilted more to that of a master, than of a servant in a master-servant relationship (ie employer-workman relationship), if any. The fact that the first respondent was a joint signatory of the applicant, is sufficient to prove that he was not a workman of the applicant.

[62] In *Beh Keang Yu @ Baik Keang Yu v Fairtrio Marketing Sdn Bhd* [2006] ILJU 69; [2006] 3 ILR 2037 ('*Beh Keang Yu*'s case') the claimant director

therein was paid monthly salaries and EPF contributions but was unable to produce any letter of appointment to indicate what was his roles and responsibilities. The company therein contended that the claimant director was removed from his position in accordance with the then Companies Act 1965 and the company's articles of association, instead of being dismissed as a workman. In determining the sole issue of whether the said claimant director was a workman as defined under s 2 of the IRA, the court held that he was not. The court held, inter alia, the followings:

> [23] *In the event I am in full agreement with the submission of the learned counsel for the company that by virtue of the claimant's appointment by way of a resolution and in the absence of any terms of employment, henceforth the claimant's functions, duties, powers and responsibilities must necessarily lie in the company's AA, as expressly provided in arts 73–78 of the same. He was exercising his duties, powers and functions pursuant to the company's AA. In that position he was one of those who could determine and formulate the directions and policies of the company. His position was further fortified by the fact that he was also one of the substantial shareholders and a member of BOD of the company who were collectively the directing minds and brains of the company.* Hence in *Lau Yau Chai v Johore Mining & Stevedoring Co Sdn Bhd* [1997] 1 MLJ 776; [1997] 1 CLJ Supp 459, the learned judge after considering *Hoh Kiang Ngan*'s case held as follows:
>
> > A person who represented the directing mind and will of the company, the very ego and the centre of the personality of the company, was not a workman within the meaning of s 2 of the Act for he was being placed in a position to determine and formulate the company's policy ... On the facts of this case, the applicant was not a workman within the contemplation of the Act. The applicant when he was holding the position of managing director for the respondents was the brain and directing mind of the respondent. This disqualifies him from being a workman under the Act.
>
> [24] On the facts, the claimant's position in the company was not much different from the position of the applicant in the above said case.

[63] It is pertinent to note that in *Beh Keang Yu*'s case, the court further held that notwithstanding the remuneration and EPF contributions made in favour of the claimant director therein, it does not affect the latter being the directing mind and brain of the company as well as it did not reduce the claimant's director position into that of a workman. This can be found in the court's dicta as follows:

> [27] I also have no hesitation in accepting COW1's testimony who was in charge of the company's admin and finance, that it was upon the claimant's behest that EPF deductions and contributions were made and the claimant's reasons for doing the same. *In any event the factum of voluntary contribution of EPF does not suddenly reduce the position of the claimant into that of a workman after having considered all the features of the claimant's engagement with the company.* (Emphasis added.)

[64] In *Actocorp Holdings Bhd v Helen Tang Chiew Yien* [2005] 2 ILR 641,

the court had considered and evaluated what was said to be the unusual circumstances of the claimant therein. In that case, the claimant commenced her employment in a subsidiary company known as Teknik Cekap Sdn Bhd prior to her transfer to the company in dispute, which was in actuality the holding company of Teknik Cekap. Teknik Cekap was wound up thereafter and hence the company informed the claimant that she was no longer required to come in office. The claimant filed a representation in the industrial relations department for a claim of unlawful dismissal. Before the Industrial Court, the company averred that the claimant was a workman of Teknik Cekap and not the company's on the grounds, amongst others, that Teknik Cekap had regularly made EPF contributions in favour of the claimant. Having evaluated the unusual circumstances of the case therein, the court had expressed the followings:

> *The court is mindful of the decision in the case of Chong Kim Sang v Metatrade Sdn Bhd* [2004] 3 MLJ 1; [2004] 2 CLJ 439 where the Court of Appeal found that contributions to EPF would be one of the factors to indicate whether a person is an employee ... *But would the decision in the case of Chong Kim Sang apply to the unusual circumstances of the present case where the facts adduced would clearly diminish or reduce the effect of the payroll and EPF factor as an indication of whether a person is an employee or workman? The court would answer this question in the negative.* (Emphasis added.)

[65] In the present matter, it cannot be disputed that being the Selangor branch treasurer, the first respondent must act in accordance with the applicant's Constitution, and this fortifies the fact that he was indeed the directing mind and brain of the applicant and as such he is disqualified from being a workman as defined under s 2 of the IRA. In view of the first respondent's position as a member cum 'employee' as defined under s 2(1) of the Trade Unions Act 1959 of the applicant and his role as the Selangor branch treasurer who was the directing mind and brain of the Selangor branch of the applicant, the EPF contribution made by the applicant would not convert his status as a member of the applicant to a workman as defined under s 2 of the IRA. In this regard, it is of the considered view that the Industrial Court had erred in arriving at its decision that the first respondent was a workman having regard to the EPF contributions made in his favour.

[66] Having found that the first respondent was never a workman but a member of the applicant the issue of whether the first respondent was dismissed with just cause or excuse is irrelevant because there was no issue of dismissal of a workman in the first place. As stated earlier, the issue herein was whether the first respondent's expulsion as a member of the applicant was lawful and such issue ought to have been ventilated through a domestic appeal to the applicant itself first, pursuant to r 12(13) of the applicant's Constitution. In the event the said domestic appeal fails, the appropriate forum to hear the first respondent's grievance shall be through a civil action in the civil court (see:

A *Visvasam v Singapore Toddy Tappers' Union* [1968] 2 MLJ 205) and not through a Minister's reference to the Industrial Court because the Industrial Court does not have the jurisdiction to adjudicate on a dispute involving an expulsion of trade union membership.

B *The third issue: Whether the award in allowing the first respondent's claim warrants the court's intervention to quash the same*

[67] Having considered all the issues in the above, the third issue is answered in the affirmative. The award is illegal, irrational and suffers severe procedural C impropriety which warrants the court's intervention to quash the same.

[68] Before departing, it must be noted that this court is of the considered view that there is no necessity to refer to the notes of evidence of the Industrial Court as the applicant is not challenging the findings of facts, but the errors of D law committed by the Industrial Court. After all, this court is well reminded that it must not interfere with the findings of fact by the Industrial Court unless it can be shown that such findings are manifestly wrong.

CONCLUSION

E

[69] Premised on the above, this court granted the order of certiorari prayed for by the applicant to quash the award and order in terms of the present application with costs.

F *Order of certiorari and order in terms of application granted with costs.*

Reported by Nabilah Syahida Abdullah Salleh

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